IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

In re:

BUFFALO COAL COMPANY, INC.,

Debtor

JOHN W. ("JACK") TEITZ, as Trustee of the Estate of BUFFALO COAL COMPANY, INC.,

Appellant,

v.

VIRGINIA ELECTRIC AND POWER COMPANY, d/b/a DOMINION VIRGINIA POWER,

Appellee.

Civil Action No. 2:10-cv-0032-JPB

Chapter 7

Appeal to the United States District Court For the Northern District of West Virginia from The Bankruptcy Court's January 26, 2010 Order of Court

OPENING BRIEF OF APPELLANT JOHN W. TEITZ,
AS TRUSTEE OF THE ESTATE OF BUFFALO COAL COMPANY, INC.

Joseph Friedman
Kimberly Luff Wakim
Robert J. Ridge
THORP REED & ARMSTRONG, LLP
One Oxford Centre, 14th Floor
301 Grant Street
Pittsburgh, PA 15219-1425
Telephone: (412) 394-7710
Facsimile: (412) 394-2555

Attorneys for Appellant
John W. Teitz, as Trustee of the Estate of Buffalo Coal Company, Inc.

Date: March 25, 2010

TABLE OF CONTENTS

Page

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES 1

STANDARD OF REVIEW 1

STATEMENT OF CASE 2

STATEMENT OF FACTS 3

I. THE SYNFUEL PLANT 3

II. THE SYNFUEL AGREEMENT 5

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. IT WAS DVP, NOT MSCS, WHO CAUSED THE TERMINATION OF THE SYNFUEL AGREEMENT AND THE BANKRUPTCY COURT ERRED WHEN IT DISMISSED THE TRUSTEE'S TORTIOUS INTERFERENCE WITH CONTRACT CLAIM AGAINST DVP 9

II. THE BANKRUPTCY COURT ERRED WHEN IT FOUND THAT DVP'S TORTIOUS CONDUCT WAS PRIVILEGED 12

A. The Privilege for Honest Advice is Not Applicable to the Circumstances of DVP's Interference 12

B. The Bankruptcy Court Erred When it Held that DVP was Privileged to Interfere Because it was a Consultant to MSCS 13

C. DVP Should Not be Permitted, as a Matter of Equity, to Claim it is "Unrelated" to MSCS on the One Hand, and in Complete Control of MSCS's Third-Party Contracts on the Other Hand 16

D. DVP's Statements to MSCS About Buffalo Were Not Truthful or Honest 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 1

Celotex v. Catrett, 477 U.S. 317 (1986) 1

Charbonnages de France v. Smith, 597 F.2d 406 (4th Cir. 1979) 2

County School Board of Henrico County, Virginia v. RT, 433 F.Supp.2d 692 (E.D. Va. 2006) 16

Davidson v. Davidson, 947 F.2d 1294 (5th Cir. 1991) 16

Federal Power Commission v. Colorado Interstate Gas Co., 348 U.S. 492 (1955) 16

Gordon v. Kidd, 971 F.2d 1087 (4th Cir. 1992) 2

In re Ballard, 65 F.3d 367 (4th Cir. 1995) 1

J.D. Edwards & Co. v. Podany, 168 F.3d 1020 (7th Cir. 1999) 13, 14

Jones v. Jones, 551 S.E.2d 37 (W.Va. 2001) 16

Overstreet v. Kentucky Central Life Ins. Co., 950 F.2d 931 (4th Cir. 1991) 2

Torbett v. Wheeling Dollar Sav. & Trust Co., 314 S.E.2d 166 (W. Va. 1984) 9

STATUTES

26 U.S.C. § 45(a)(2)(B) 4, 5, 16

26 U.S.C. § 45(c)(1)(C) 4

28 U.S.C. § 158(a) 1

OTHER AUTHORITIES

Restatement (Second) of Torts § 772 .... 12, 17

RULES

Fed. R. Bankr. P. 7056 1

Fed. R. Bankr. P. 8002 1

Fed. R. Civ. P. 56(c) 1

STATEMENT OF JURISDICTION

The Court has subject matter jurisdiction to hear this appeal pursuant to 28 U.S.C. § 158(a) and Rule 8002 of the Federal Rules of Bankruptcy Procedure.

STATEMENT OF ISSUES

I. By holding that Defendant/ Appellee Virginia Electric and Power Company ("DVP") could cause the termination of a valid and binding contract between the Debtor Buffalo Coal Company, Inc. ("Buffalo") and Mt. Storm Coal Supply, LLC ("MSCS"), whether the Bankruptcy Court improperly applied the privilege for "honest advice."

II. Whether the Bankruptcy Court made improper factual determinations and, therefore, erred in holding on summary judgment that DVP merely assisted and advised MSCS, when the evidence shows that DVP intentionally interfered and caused the termination of the contract between MSCS and Buffalo without the authority to do so.

STANDARD OF REVIEW

A bankruptcy court's grant of summary judgment is reviewed *de novo*. In re Ballard, 65 F.3d 367, 370 (4th Cir.1995). Summary judgment is not appropriate unless the matters presented to the court "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law ." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; Celotex v. Catrett, 477 U.S. 317, 322 (1986). In ruling on a motion for summary judgment, a court's function is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Moreover, summary judgment is inappropriate even where there is no dispute as to the evidentiary facts but only as to the inferences to be drawn from those facts.

Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979); Gordon v. Kidd, 971 F.2d 1087, 1093 (4th Cir. 1992); Overstreet v. Kentucky Central Life Ins. Co., 950 F.2d 931, 937 (4th Cir. 1991).

STATEMENT OF CASE

The Debtor, Buffalo Coal Company, Inc. ("Buffalo" or "Buffalo Coal"), commenced its bankruptcy case on May 5, 2006 by filing a voluntary petition under the Bankruptcy Code. The Appellant/ Trustee, John W. Teitz, was appointed to administer the estate of Buffalo on behalf of the creditors of Buffalo.

On May 1, 2008, the Trustee filed the adversary proceeding docketed in the Bankruptcy Court at Adv. Proc. No. 08-00038 (the "First Adversary Proceeding"), stating claims for breach of contract and for indemnification against Defendant Virginia Electric and Power Company, d/b/a Dominion Virginia Power ("DVP"). In the First Adversary Proceeding, the Trustee averred that DVP breached a 2005 Agreement for the Supply of Coal to Mount Storm Power Station (the "2005 Coal Supply Agreement") between DVP and Buffalo, as well as a 2005 Settlement and Release Agreement between the same parties. The Trustee also stated a claim for indemnification pursuant to an indemnification provision in the 2005 Coal Supply Agreement.[1] The First Adversary Proceeding was tried on the merits commencing March 1, 2010. As of the filing of this brief, no decision has been issued.

On or about May 5, 2008, the Trustee filed a second adversary proceeding against DVP, Mount Storm Coal Supply, LLC ("MSCS") and Pace Carbon Fuels, LLC ("Pace") docketed at Adv. Proc. No. 08-00041 (the "Second Adversary Proceeding"). It is this case that the Trustee

[1] The Court entered summary judgment in favor of DVP on the indemnification claim by Order dated September 30, 2009.

presently appeals. In the Second Adversary Proceeding, the Trustee set forth a breach of contract claim against MSCS and Pace for their breach of a 2005 Amended and Restated Agreement for the Supply of Coal to the Synthetic Fuel Facility located at Mt. Storm Power Station between Buffalo and MSCS (the "2005 Synfuel Agreement"). The Trustee also set forth a tortious interference with contract claim against DVP for its interference with the 2005 Synfuel Agreement that resulted in Pace/MSCS terminating that contract. The Trustee and MSCS/Pace settled the claims against Pace and MSCS.

On January 26, 2010, the Bankruptcy Court granted DVP's motion for summary judgment and dismissed the claim against DVP in the Second Adversary Proceeding. Memorandum Opinion and Order, Record Nos. 48 and 49. All other counts of the Trustee's Amended Complaint having been settled, the Bankruptcy Court entered a separate order dismissing the Second Adversary Proceeding. The Trustee thereafter timely filed his notice of appeal.

STATEMENT OF FACTS

I. THE SYNFUEL PLANT

Buffalo, prior to filing its petition for bankruptcy, operated coal mines in northeastern West Virginia along the Maryland border in an area known as Mount Storm, as well as in Maryland. Buffalo's primary customer was, and had been for over two decades, DVP. Under various coal supply agreements, DVP was the ultimate purchaser for approximately 95% of Buffalo's total coal production. DVP purchased so much of Buffalo's production because of the close proximity between Buffalo's operations and a power plant operated by DVP known as the Mt. Storm Power Station, located in Grant County, West Virginia.

The Mt. Storm Power Station consisted of a power station operated by DVP and a separate synthetic fuel facility that processed coal into synthetic fuel ("Synfuel Plant"). DVP

neither owned nor operated the Synfuel Plant. Instead, sometime in 2004, DVP entered into a business arrangement with an affiliate of MSCS to operate the Synfuel Plant. Under this arrangement, MSCS agreed to purchase coal and, through its affiliate PC West Virginia Synthetic Fuel #2, L.L.C. ("PC WV"), process the coal (now called "feedstock") into synthetic fuel. See Deposition Transcript of Kirby Martin, Jr. ("Martin Tr."), at 33-36 [Record 1]. PC WV would then sell the coal to DVP under a separate agreement. See Synthetic Fuel and Coal Supply Agreement ("Coal Supply Agreement") [Record 3].

DVP structured this arrangement in order to monetize for its benefit a substantial tax credit provided by the federal government known as the Section 29 tax credit. The purpose of the Section 29 credit was to encourage the production of domestic energy while reducing U.S. reliance on energy imports. Section 29, therefore, provides a substantial tax credit against income for producers of "…solid synthetic fuels produced from coal (including lignite), including such fuels when used as feedstocks." 26 U.S.C. § 45(c)(1)(C) (formerly § 29) ("Section 29"). In order to receive the Section 29 credit, a producer of solid synthetic fuels cannot use the synthetic fuel itself but must instead sell the fuel in the market to an "unrelated entity." Id. at § 45(a)(2)(B)

Thus, in order to qualify for the Section 29 credit, the entity operating the Synfuel Plant could not be related to DVP. See e.g., Martin Tr., 4/22/09, at 209-210 [Record No. 1]; Deposition of Tracey McClung ("McClung Tr."), 11/4/09, at 54:7-55:10 [Record No. 2] (testifying that due to "tax optics," DVP could not be a party to the Synfuel Agreement between Buffalo and MSCS). MSCS as the "producer" of synthetic fuel received the Section 29 credit by selling its synthetic fuel to DVP. Through various agreements, including a Coal Consulting Agreement, MSCS then passed a significant portion of the proceeds of the Section 29 credit to

DVP through various fees and discounts. See e.g. Coal Consulting Agreement ("Consulting Agreement") [Record 4]. Among such fees, MSCS paid DVP a fee of $0.20 per ton of coal handled by MSCS at the Synfuel Plant in exchange for DVP's "consulting services." Id.

II. THE SYNFUEL AGREEMENT

In November, 2005, MSCS entered into a contract with Buffalo to purchase the coal which it then processed at the Synfuel Plant and sold through its affiliate to DVP. See Synthetic Feedstock Agreement ("Synfuel Agreement") [Record 7].[2] The Synfuel Agreement was entered into for an initial period of 5 years. Id. During the period October 2005 through February 2006, more than 50% of Buffalo's coal shipments were pursuant to the Synfuel Agreement with MSCS. See Deposition of Benjamin Baughan ("Baughan Tr."), 5/6-7/09, at 56:1-12 [Record 8].

On February 22, 2006, DVP terminated its own coal supply agreement with Buffalo, a mere four months after the five-year contract term commenced. See Deposition Exhibit 1 [Record No. 9]; McClung Tr. At 15:20-18:19 [Record 2]. At the same time, DVP induced MSCS to terminate the Synfuel Agreement purportedly pursuant to its authority as a "consultant" for MSCS. That DVP induced termination of the Synfuel Agreement is evidenced by the following events:

- **February 22, 2006- Late Afternoon**

  DVP's Ben Baughan advises MSCS, through its contractor and Synfuel Plant Operator, Tom DiMuzio, that the Synfuel Plant would no longer be receiving any Buffalo coal and that the "Buffalo contract" had been terminated.

  See Deposition Exhibit 3 [Record 10]; Deposition Exhibit 30 [Record 11].

[2] The November, 2005, Synthetic Feedstock Agreement was a continuation, by restatement and amendment, of the initial contract between MSCS and Buffalo which was executed in January, 2005.

- **February 23, 2006 – 7:41 A.M.**

  Kirby Martin, MSCS, sends an email to Clarence Perkinson of Magellan Resources (an affiliate company to Pace, which is the parent company of MSCS) regarding Mr. Baughan's conversation with Mr. DiMuzio the evening before, stating "Dominion informed Tom Dimuzio[sic] @ WV #2 [synfuel plant operator referred to herein as PC WV] that he would no longer receive any coal from Buffalo for the synfuel plant." He further states that he had told Mr. Baughan that MSCS needed some formal documentation "relative to this matter between Dominion & Mount Storm Coal Supply."

  See Deposition Exhibit 30 [Record 11] (emphasis added).

- **February 23, 2006 – 10:43 A.M.**

  Ben Baughan, DVP, emails others at DVP that he "just spoke with Kirby Martin (Pace) and advised him that the Buffalo contract had been terminated, effective yesterday." He goes on to state that he also told Mr. Martin that he had "advised Tom DiMuzio of this decision late yesterday afternoon." He further states that he understood that [DVP's] Dennis [Lane] was looking at the contract documents and, he presumed, would prepare the appropriate notice, similar to yesterday's notices.

  Additionally, the email states that Baughan had spoken with an administrative assistant at Constellation Operating Services (contractor for MSCS) "a few minutes ago." He states that "two deliveries were made very early today to the synfuel plant by Buffalo in [two] axle trucks . . . [i]t is possible that the fax notices [termination letters] were not received by office staff at Oakland yesterday evening in time for Dominion's decision to be communicated to the operating personnel at [Buffalo's] Gatzmer [location] prior to the two shipments being made [that] morning."

  See Deposition Exhibit 3 [Record 10] (emphasis added).

- **February 23, 2006 – 11:40 A.M.**

  Keith Kriebel, counsel for MSCS, emails Kirby Martin, MSCS, and requests information about the grounds used by DVP to the Synfuel Plant to tell that they wouldn't accept synfuel made from Buffalo coal. Mr. Kriebel states that he would like to know how DVP could just "shut off" the Buffalo supply.

  See Deposition Exhibit 31 [Record 12].

- **February 23, 2006 – 12:17 P.M.**

  Kirby Martin, MSCS, emails Keith Carney, DVP, and asks him to provide the information requested by Mr. Kriebel in the above email.

  See Deposition Exhibit 31 [Record 12].

- **February 23, 2006 – 5:23 P.M.**

  DVP's Ms. McClung emails Clarence Perkinson and Kirby Martin (Pace / MSCS), with a copy to Keith Carney, DVP, providing MSCS a form of letter for termination of the Synfuel Agreement. DVP's Ms. McClung further advises Perkinson and Martin to print a copy of the form of letter on Pace's letterhead.

  See Deposition Exhibit 4 [Record 13]; see also McClung Tr. at 28:25-39:7 [Record 2].

Significantly, MSCS conceded that it *would not have* cancelled the Synfuel Agreement absent DVP's declaration that the Synfuel Plant would "not be receiving anymore coal from Buffalo" as of February 23, 2006. See Martin Tr. at 98-104 [Record 1]. Absent termination by DVP, Buffalo would have continued to sell coal to MSCS pursuant to the Synfuel Agreement. Martin Tr. at 102-111 [Record 1]; Baughan Tr. at 26-27 [Record 8].

SUMMARY OF ARGUMENT

DVP's inducement of the termination of the Synfuel Agreement – a contract to which it was not a party – is as clear a case of tortious interference with another's contract as they come. Indeed, the Bankruptcy Court did not, because it could not, hold that the Trustee failed to set forth a *prima facie* case of tortious interference. Instead, the Bankruptcy Court found that DVP's conduct (however improper) was nonetheless privileged from liability because DVP merely provided "honest advice" to MSCS as a "consultant" which resulted in termination of the Synfuel Agreement.

In order to make this finding, the Bankruptcy Court undermined and outright ignored the true nature of DVP's conduct. Not only was this an improper factual finding at the summary

judgment stage, the undisputed evidence set forth by the Trustee showed that DVP did far more than provide advice to MSCS. DVP, in fact, cut off the supply of Buffalo coal to the Synfuel Plant and thereby, both effectively and expressly, terminated the Synfuel Agreement. DVP exceeded the circumstances of a mere consultant providing advice, and, by so doing, exceeded the protection provided by the honest advice privilege.

Moreover, the Coal Consulting Agreement upon which DVP's entire claim of privilege is based simply did not, under any fair reading, confer upon DVP the authority to cause the termination of MSCS's contracts. In the absence of such authority, DVP has no basis to now claim that it was somehow obligated/justified to interfere with the contract between MSCS and Buffalo. Further, even if the Coal Consulting Agreement provided such broad authority, DVP should not be permitted to advance this argument in the face of years of representing to the Internal Revenue Service that it and MSCS were arms-length, unrelated entities for purposes of the benefit of the Section 29 tax credit.

Finally, even the "advice" DVP provided to MSCS was dishonest and, therefore, not privileged. DVP declared to MSCS that it would not be receiving anymore Buffalo coal when, in fact, Buffalo continued to attempt to make coal deliveries and would have continued to do so absent termination of the Synfuel Agreement.

The Bankruptcy Court's dismissal of the Trustee's claim against DVP ignored the facts of this case and was improper as a matter of law. As such, this Court should reverse the Bankruptcy Court's holding and reinstate the Trustee's claim.

ARGUMENT

I. IT WAS DVP, NOT MSCS, WHO CAUSED THE TERMINATION OF THE SYNFUEL AGREEMENT AND THE BANKRUPTCY COURT ERRED WHEN IT DISMISSED THE TRUSTEE'S TORTIOUS INTERFERENCE WITH CONTRACT CLAIM AGAINST DVP

To establish his case of tortious interference with contract claim, the Trustee set forth facts sufficient to show: (1) the existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages. Torbett v. Wheeling Dollar Sav. & Trust Co., 314 S.E.2d 166 (W. Va. 1984).

First, the fact of a binding contract between MSCS and Buffalo has not been disputed. Second, intentional interference by DVP is plainly evidenced by the fact that, in reality, it was DVP, not MSCS, which caused the termination of the Synfuel Agreement. DVP itself has admitted that:

- MSCS was unable to "enforce" its agreement with Buffalo and, therefore, relied entirely on DVP to do so. [See Memorandum in Support of Virginia Electric and Power Company's Motion for Summary Judgment in Synfuel Action (" DVP Memorandum"), pp. 3, 19, 20 [Record 24]]; and

- After DVP terminated its agreement with Buffalo, "the Synfuel Feedstock Agreement served no purpose and required no performance by MSCS." (Id., p. 16).

Although it would be the rare defendant who would admit the fact of its interference, DVP's stated obligation to "enforce" the Synfuel Agreement should be interpreted as a clear admission that DVP directed the termination of the Synfuel Agreement for and on behalf of MSCS (who was, according to DVP, incapable of doing so itself).

Beyond the clear facts of DVP's own admission, the events relating to termination of the Synfuel Agreement, when viewed chronologically, demonstrate that it was DVP which actually terminated MSCS's contract with Buffalo:

February 22, 2006:

- **At 5:12 P.M.**: DVP terminates its own contract by fax letter to Buffalo. [See Deposition Exhibit 1 [Record 9]; McClung Tr. at 15:20-18:19 [Record 2]].

- **Sometime before DVP's termination (i.e., "late afternoon")**: DVP informs MSCS, through its contract-operator at the Synfuel Plant, that the Synfuel Plant "would no longer receive any coal from Buffalo." DVP also informs the Synfuel Plant that the "Buffalo contract" had been terminated. [See Deposition Exhibit 3 [Record 9]; Deposition Exhibit 30 [Record 11]].

February 23, 2006

- **Prior to 7:41 A.M.**: DVP speaks to the management of MSCS and notifies management that the Synfuel Plant operators were informed that they would no longer be receiving coal from Buffalo. [See Deposition Exhibit 30 [Record 11]].

- **Prior to 10:43 A.M.**: Buffalo makes two deliveries to the Synfuel Plant. [Id.]

- **10:43 A.M.**: DVP's Baughan states that it is possible that Buffalo's deliveries to the Synfuel Plant were made that morning because "the fax notices were not received by office staff at Buffalo's Oakland office yesterday evening" in time for Buffalo to stop the deliveries. Baughan also states that DVP's counsel is preparing appropriate written notices regarding termination of the Synfuel Agreement. [Id.]

- **11:40 A.M.**: MSCS's counsel emails MSCS management and asks, among other things, how DVP could just "shut off" the Buffalo supply to the Synfuel Plant. He also asks for an explanation of DVP's authority to tell the Synfuel Plant that they were not to receive anymore Buffalo Coal. [See Deposition Exhibit 31 [Record 12]].

- **5:23 P.M.**: DVP provides MSCS a form letter for termination of the Synfuel Agreement and tells MSCS to print the letter on letterhead, have it signed, and fax it to the same people as the day before. [See Deposition Exhibit 4 [Record 13]; McClung Tr. at 28:25-39:7 [Record 2]].

When the evidence above is viewed with all reasonable inferences in favor of the Trustee, the fact of DVP's interference is evident. DVP expressly declared to the operator of the Synfuel Plant that MSCS would not be receiving anymore coal from Buffalo on February 22, 2006, likely before (and at the very least immediately after) DVP terminated its own contract. As counsel for

MSCS observed, DVP "cut off" the Buffalo supply to the Synfuel Plant. Performance by either Buffalo or MSCS was now impossible, and the Synfuel Agreement was effectively terminated.

Moreover, the DVP email of February 23, 2006, 10:43 A.M., states that the Synfuel Plant [Mr. DiMuzio] had been advised of DVP's decision to terminate the "Buffalo contract" "late yesterday afternoon." See Deposition Exhibit 3 [Record 10]. In light of the fact that *we know* Mr. DiMuzio received word that the Synfuel Plant "would not be receiving anymore Buffalo coal," it is – at a minimum – unclear (and genuine issues of fact existed with respect to) whether in referring to the "Buffalo contract," DVP was indicating that it in fact informed Mr. DiMuzio that DVP had expressly terminated the *Synfuel Agreement*.

MSCS's counsel recognized and, in fact, specifically questioned, DVP's purported authority to terminate the Synfuel Agreement by cutting off the supply of Buffalo coal to the Synfuel Plant. See Deposition Exhibit 31 [Record 12]. Significantly, with respect to the formalities of termination, it was not MSCS or its counsel who prepared the formal notice of termination; rather, it was DVP. See Deposition Exhibit 4 [Record 13]; McClung Tr. at 28:25-39:7 [Record 2].

MSCS conceded that it would not have terminated the Synfuel Agreement but for DVP's conduct, thus satisfying the causation element of the Trustee's tortious interference claim. Martin Tr. at 98-104, 211-212 [Record 1]. Notably, MSCS was concerned enough about DVP's interference at the time that, sometime immediately after February 23, 2006, someone on behalf of MSCS requested that Buffalo agree to release MSCS from liability for termination of the Synfuel Agreement. See Ramsburg Supplemental Declaration, ¶ 12 [Record 16].

That DVP's conduct caused the cessation of Buffalo's business is a well-established fact. See e.g., Ramsburg Supplemental Declaration at Exhibit 1, ¶¶ 65-66 [Record 16]; see also Expert

{01101000}

Report of Gleason & Associates, at p. 40 [Record 16]. The tortious nature of DVP's conduct was amply evidenced by the circumstances surrounding termination of the Synfuel Agreement. There should be no dispute that the Trustee set forth a *prima facie* case of tortious interference with contract. Indeed, the Bankruptcy Court did not dispute the Trustee's *prima facie* case.

II. THE BANKRUPTCY COURT ERRED WHEN IT FOUND THAT DVP'S TORTIOUS CONDUCT WAS PRIVILEGED

Instead, in dismissing the Trustee's claim, the Bankruptcy Court found that DVP's conduct relating to termination of the Synfuel Agreement was privileged by virtue of DVP's role as a "consultant" to MSCS under Section 772 of the Restatement (Second) of Torts. Memorandum Opinion, pp. 4-8 [Record 48]. According to the Court, as MSCS's consultant, DVP merely provided "honest advice" which prompted MSCS to terminate the Synfuel Agreement. Id. This factual finding at the summary judgment stage ignored the Bankruptcy Court's obligation to make all reasonable inferences in favor of the Trustee. Moreover, it was wrong on the facts.

A. *The Privilege for Honest Advice is Not Applicable to the Circumstances of DVP's Interference*

In order to find privilege, the Bankruptcy Court ignored the overwhelming evidence of record and downplayed DVP's tortious actions as "advice" regarding termination. Specifically, contrary to all of the evidence, the Bankruptcy Court held that DVP's conduct consisted only of providing MSCS with "an explanation of the basis for DVP's termination of its supply contract with the Debtor, and on how MSCS could terminate the Synfuel Feedstock Agreement." Memorandum Opinion, p. 7 [Record 48]. DVP, however, did far more than advise MSCS− DVP caused a *de facto* termination of MSCS's contract, as set forth above. The Section 772 privilege is aimed at protecting "honest communications," not tortious conduct. See Rest. (Second) Torts, § 772, cmt. c.

The Bankruptcy Court relied on the Seventh Circuit's opinion in J.D. Edwards & Co. v. Podany, 168 F.3d 1020 (7th Cir. 1999), in concluding that advice that, in hindsight, proves to be ill-informed, ill-advised or negligent can still be protected as "honest advice". Memorandum Opinion at 8. However, the Court in J.D. Edwards recognized that the privilege is not unqualified and that the advice must be given in good faith, that is, the privilege is lost if a consultant "does not give honest advice – if he uses his engagement to hurt other people exclusively for his own benefit (or out of dislike of his victim) rather than for the benefit of his client", J.D. Edwards, 168 F.2d at 1023, or if the consultant acts "solely to feather his own nest, and without believing that (or caring whether) he is helping his client", id.

In the instant case, DVP was not acting in the interests of MSCS. To the contrary, DVP induced MSCS to terminate the Synfuel Agreement with Buffalo because it (DVP) did not want to receive anymore coal from Buffalo. DVP's directive to MSCS that it terminate the Synfuel Agreement was not merely "ill-informed, ill-advised or negligent" advice in hindsight. To the contrary, DVP statements and actions were dishonest and untruthful when made.

The Bankruptcy Court's factual finding that DVP merely provided honest advice is contrary to the evidence and certainly improper at the summary judgment stage. In light of the fact that DVP's conduct consisted of far more than advice, the honest advice privilege is simply inapplicable in this case and the Bankruptcy Court erred by finding otherwise.

B. *The Bankruptcy Court Erred When it Held that DVP was Privileged to Interfere Because it was a Consultant to MSCS*

As cited by the Bankruptcy Court, the consultant's privilege exists because "[i]t would cast quite a large, dark cloud over the consulting business if consultants could be hauled into court for having given advice that in hindsight could be characterized as having been ill-advised, ill-informed, or otherwise negligent." Memorandum Opinion, p. 4 [Record 48], citing J.D.

{01101000}

Edwards, supra, 168 F.3d at 1022. In applying the consultant's privilege to DVP's termination of the Synfuel Agreement, the Bankruptcy Court relied on Section 6.3(e) of the Coal Consulting Agreement between MSCS and DVP. According to the Bankruptcy Court, the language in Section 6.3(e) providing that DVP would assist MSCS in "administering the Supplier Contracts, including . . . pricing determinations, arbitrations and other enforcement actions" was "broad enough" to cover termination by DVP of the Synfuel Agreement. Memorandum Opinion, p. 6 [Record 48], citing Section 6.3(e).

However, DVP's obligation under Section 6.3(e) was considerably more limited than the finding of the Bankruptcy Court. Section 6.3(e) applied only to the circumstances surrounding delivery by a coal supplier of "non-conforming" coal to the Synfuel Plant. See Coal Consulting Agreement, § 6.3(e) [Record 4]. Hence, the seemingly broad language cited by the Bankruptcy Court was plainly qualified, when read in its entirety, by the remainder of Section 6.3(e) setting forth the responsibilities arising from deliveries to the Synfuel Plant of "non-conforming" coal (i.e., coal which does not fit DVP's chemical composition requirements). Id. Section 6.3(e) states that DVP will assist MSCS in the

> exercise of its rights to reject coal under the related Supplier Contract (where practicable under the circumstances), to seek a purchase price adjustment, or otherwise. [MSCS] shall make decisions and execute documents under the Supplier Contract, but DVP will assist in dealing with the Supplier as [MSCS] may reasonably request.

Coal Consulting Agreement, § 6.3(e) [Record 4] (emphasis added).

The Material Handling Agreement between DVP and MSCS, entered into simultaneously with the Coal Consulting Agreement, further explains Section 6.3(e) as relating only to rejection of "non-conforming" coal, providing that for "any shipment" of coal which "does not conform to the requirements of the related Supplier Contract, [DVP] will notify [PC WV] and provide

information necessary for [DVP] to perform its services under Section 6.3(e) of the Coal Consulting Agreement." See Handling Agreement, § 6.1(g) [Record 6] (emphasis added).

In the Coal Supply Agreement between DVP and PC WV, DVP agreed that it would release and not pursue any damages for "non-conforming" coal provided by PC WV to DVP, so long as PC WV followed the advice of DVP to accept or reject the coal pursuant to the terms of the Coal Consulting Agreement. See Coal Supply Agreement, § 8.8 [Record 3].

In short, Section 6.3(e) provided only that, should DVP determine that a certain coal shipment is "non-conforming" pursuant to the Handling Agreement, DVP would assist MSCS in rejecting the shipment and pursuing remedies (such as a price adjustment) based on the rejection. DVP accepted this responsibility because, if it did not, it could not turn around and assert a damage claim against MSCS/ PC WV because such claim had been waived under the Coal Supply Agreement. The Coal Consulting Agreement makes clear that, regardless of DVP's "consulting" services, MSCS *alone* was responsible for its supplier contracts, including the agreement with Buffalo. See Coal Consulting Agreement, §§ 6.3(d), 6.4(d) & 7.1 [Record 4]. Moreover, MSCS *alone* was responsible for its "performance" of its supplier contracts. See Handling Agreement, § 6.1(a) [Record 6].

Section 6.3(e) did *not* confer upon DVP the responsibility for terminating MSCS's third-party contracts. Although, in reality, DVP's power over MSCS may have exceeded the terms of any consulting responsibility it had to MSCS, this does not excuse DVP's interference or otherwise confer some privilege upon its actions. DVP was not obligated by contract to terminate MSCS's contracts and no privilege exists to protect its conduct.

C. *DVP Should Not be Permitted, as a Matter of Equity, to Claim it is "Unrelated" to MSCS on the One Hand, and in Complete Control of MSCS's Third-Party Contracts on the Other Hand*

Not only do the terms of the Coal Consulting Agreement not justify DVP's tortious interference, but this Court should refuse to permit DVP to even advance this argument when it previously asserted a diametrically opposed position in order to benefit from the multi-million dollar Section 29 tax credit. As set forth above, DVP and MSCS were required to maintain an arms-length business relationship in order to reap the benefits of the credit. 26 U.S.C. § 45(a)(2)(B). Yet, DVP now alleges that it was far from arms-length to MSCS, but was instead in control of key aspects of MSCS's third-party contracts by virtue of its role as a "consultant." Indeed, DVP seemingly controlled an unrelated entity under the alleged guise of "consulting" with the ulterior motive of appreciating a tax credit to which it was not entitled. This Court should not protect such conduct from the harm resulting to innocent third-parties.

It is axiomatic that a party may not accept the benefits of a transaction or statute and then subsequently take an inconsistent position to avoid its corresponding effects. See Federal Power Commission v. Colorado Interstate Gas Co., 348 U.S. 492, 473 (1955) (where Federal Power Commission approved merger of gas company and gas company accepted benefits of merger, company could not turn around and challenge condition of commission's approval); Jones v. Jones, 551 S.E.2d 37, 41 (W.Va. 2001) (by accepting benefits of document, and by failing to return benefits prior to bringing action, plaintiff was precluded from challenging document); County School Board of Henrico County, Virginia v. RT, 433 F.Supp.2d 692, 705 (E.D. Va. 2006) (plaintiff who accepted significant federal funds pursuant to federal statute could not later attack the validity of the statute in order to avoid its effects); Davidson v. Davidson, 947 F.2d 1294, 1297 (5th Cir. 1991) (debtor forbidden from accepting benefits of tax deduction and

{01101000}

then subsequently taking inconsistent position to avoid corresponding effect in bankruptcy proceeding).

To allow DVP to participate in the establishment of an intricate and unambiguous relationship with MSCS and its affiliates, carefully distinguishing itself as "unrelated" to MSCS before the Internal Revenue Service, and consistently taking advantage of this characterization for purposes of the economic benefits of the Section 29 credit, only to then declare that it had the right as a "consultant" to control MSCS's third-party contracts, including by terminating such contracts, would be a legal affront to both this Court and the tax code. For this additional reason, this Court should find that the Bankruptcy Court erred when it held that DVP's tortious interference was otherwise privileged from the Trustee's claim.

D. *DVP's Statements to MSCS About Buffalo Were Not Truthful or Honest*

Even putting aside DVP's conduct and the ample reasons why such conduct is not privileged, DVP's words alone would still not be protected by Section 772 of the Restatement because DVP was neither truthful nor honest. As the Bankruptcy Court even recognized, "The [honest advice] defense is lost, however, if the advice is not within the scope of the request for advice, or is dishonest. Restatement (Second) Torts § 772." Memorandum Opinion at 4.

DVP informed MSCS that it would be receiving no more Buffalo coal on the morning of February 23, when, in fact, Buffalo was making two deliveries of coal on that very day. See Deposition Exhibit 3 [Record 10]. Indeed, DVP told MSCS that it was not getting anymore Buffalo coal when, in fact, Buffalo stood ready, willing and able to deliver. Ramsburg Supplemental Declaration, ¶ 16 [Record 16]. If Buffalo had been allowed to continue to deliver coal to the Synfuel Plant and be paid for such coal sales, the circumstances of Buffalo's cessation

of operations would have been different.[3] Buffalo would not have shut down, but would have obtained financing and continued to operate and sell coal pursuant to the Synfuel Agreement and derive a reasonable profit margin. Ramsburg Supplemental Declaration, ¶¶ 18, 19 [Record 16]. For these reasons, at the very least, it was an issue of disputed fact as to whether or not DVP's statements to MSCS and with respect to MSCS's termination of the Synfuel Agreement were honest and truthful. The Trustee submits that it is abundantly clear that they were not. Accordingly, Section 772 offered DVP no protection for its actions or words, and DVP's motion for summary judgment should not have been granted by the Bankruptcy Court.

[3] On February 23 or 24, 2006, Buffalo received advice of counsel that unless it had sufficient capital or cash to meet its payroll and other obligations, it would need to cease its operations to avoid defrauding its employees and/or creditors. According to Buffalo's counsel, to have continued to operate with its employees, without a customer for the bulk of its coal so as to generate cash to meet its payroll and other obligations, would have been a fraud on its employees and creditors. Accordingly, as of February 24, 2006, Buffalo followed its counsel's advice in good faith and ceased operations. Ramsburg Supplemental Declaration, ¶ 17 [Record 16].

CONCLUSION

The Trustee's claim for tortious interference with contract against DVP should not have been dismissed by the Bankruptcy Court. The fact of DVP's interference is abundantly evidenced by DVP's outright *de facto* termination of the Synfuel Agreement. In the same vein, such termination of another's contract cannot, under any circumstances, be viewed as mere "honest advice." Accordingly, the Trustee requests that this Court reverse the decision of the Bankruptcy Court dismissing his claim against DVP and remand the case to the Bankruptcy Court for trial on the merits.

Dated: March 25, 2010

/s/ Joseph Friedman

Joseph Friedman (WV Bar No. 9659)
Kimberly Luff Wakim (WV Bar No. 4989)
Robert Ridge (WV Bar No. 7624)
Thorp Reed & Armstrong, LLP
One Oxford Centre
301 Grant Street, 14th Floor
Pittsburgh, PA 15219
(412) 394-7711 (T)
(412) 394-2555 (F)
Counsel for Appellant, John W. ("Jack") Teitz, Trustee of the Estate of Buffalo Coal Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of March, 2010, I caused copies of the foregoing **OPENING BRIEF OF APPELLANT JOHN W. TEITZ, AS TRUSTEE OF THE ESTATE OF BUFFALO COAL COMPANY, INC.** to be served by electronic notification via the Court's ECF system and by U.S. First Class mail, as follows:

Denise Knouse-Snyder
PHILLIPS GARDILL KAISER &
ALTMEYER, PLLC
61 Fourteenth Street
Wheeling, West Virginia 26003
Telephone: (304) 232-6810
Fax: (304) 232-4918
denisesnyder@pgka.com
Counsel for Virginia Electric and
Power Company

Richard J. Cromwell
Dion W. Hayes
Aaron G. McCollough
McGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
Telephone: (804) 775-1000
Fax: (804) 775-1061
rcromwell@mcguirewoods.com
dhayes@mcguirewoods.com
amccollough@mcguirewoods.com
Counsel for Virginia Electric and
Power Company

By: /s/ Joseph Friedman